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Supreme Court of the United States

October Term, 1971.

No. 71-1467

PATRICK J. FLYNN,

Petitioner,

against

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

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No.

PATRICK J. FLYNN, JR.,

Petitioner,

against

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of New York, County of Kings, to review an order of the Appellate Division, Second Department, of the said Supreme Court, entered on June 14, 1971 (one paper), which affirmed two (2) judgments of the said Supreme Court, entered on January 5, 1971, and on February 18, 1971, which dismissed two separate petitions seeking judicial review of a determination made by the respondent on March 20, 1969, and another determination, made by the respondent on August 5, 1969, which rated unsatisfactory the petitioner's record as a teacher, and denied his applications for license and appointment as a Chairman of Department in English in High Schools, and as Assistant to Principal in Junior High Schools of the Board of Education of the City of New York.

Petitioner commenced two separate proceedings under Article 78 of the New York Civil Practice Law and Rules for judicial review of each such determination. The Appellate Division entered one order on June 14, 1971, which affirmed two separate judgments dismissing the petitions in each such proceeding.

The instant petition for a writ of certiorari seeks to review the order of the Appellate Division affirming the dismissal of both such petitions.

On February 17, 1972, the Court of Appeals of the State of New York made one order, which dismissed two appeals taken by petitioner, one in each such proceeding, on the ground that no substantial constitutional question was presented thereby.

Opinions Below.

The only opinions in both cases, written by the Special Term of the Supreme Court of the State of New York, are not reported in the official or unofficial law reports. They appear at Appendix B, *infra*, pages 37 to 40. No opinion was written by the Appellate Division of the Supreme Court of the State of New York in affirming the two judgments, which dismissed the two petitions herein, 37 A. D. 2d 696; and no opinion was written by the Court of Appeals of the State of New York, in dismissing the two appeals from such order of the said Appellate Division.

Jurisdiction.

The order of the Appellate Division of the Supreme Court of the State of New York was entered on June 14, 1971, and appears herein at Appendix D, *infra*, pages 45 to 46.

The order of the Court of Appeals of the State of New York, dismissing the two appeals from such order of the said Appellate Division, was entered on February 17, 1972, and appears herein at Appendix E, *infra*, pages 47 to 48.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1257 (3).

Questions Presented.

1. Did the Board of Examiners of the Board of Education of the City of New York ("the Board of Examiners") unconstitutionally deprive the petitioner of procedural and substantive due process of law, by rating unsatisfactory the petitioner's record as a teacher, in two competitive examinations for license and appointment as Chairman of Department in English in Public High Schools, and as an Assistant to Principal in Public Junior High Schools, without giving him advance notice of the reasons for such proposed rating, and without giving him a hearing on factual issues concerning his record as a teacher, with opportunity to present evidence concerning his record as a teacher, and to cross examine witnesses who testify against him?

2. Were the by-laws of the Board of Examiners unconstitutionally vague in their definition of a teacher's record, and in their standards for rating thereof?

3. Did the standards and procedures used by the Board of Examiners in rating the petitioner's record as a teacher bear a reasonable relationship to successful performance by petitioner of the jobs of Chairman of Department in a Public High School, and Assistant to Principal in a Public Junior High School, for which the Board of Examiners rated his record as a teacher?

4. Was the Board of Examiners required to provide an impartial decision maker, instead of giving the power of decision to school principals whom it employed as assistant examiners to interview the petitioner and to rate his record, where such school principals had a community of interest in sustaining subjective and conclusory ratings unfavorable to petitioner, made by his principals?

Statement of the Case.

Petitioner served as a teacher in the elementary public schools of the City of New York from 1946 to June, 1966; and since September, 1966, to date, he has been serving as a teacher of English in the public high schools of the City of New York (A 10).

On November 15, 1966, the Board of Examiners announced an open competitive examination for license and appointment as Chairman of Department in English in High Schools (A 12, A 71).

Petitioner applied for and participated in such examination, in which he passed all parts of the examination, except the rating of his record as a teacher. Petitioner received the following passing ratings in the other parts of that examination: 61.9% in the Written Test; 55% in the Teaching Test; 70% in the Interview Test; and a rating of "Satisfactory" in written English (A 71).

Criticisms and Commendations by School Principal Donald J. Ryan.

The Board of Examiners mailed a questionnaire concerning the petitioner to Donald J. Ryan, principal of William Cullen Bryant High School, in which petitioner has been serving as a teacher of English since September, 1966 (A 72).

On March 7, 1968, Mr. Ryan returned this questionnaire to the Board of Examiners, filled out, and with his signature thereon. In such questionnaire a checkmark was placed next to the printed phrase: "I hesitate to recommend the applicant for the license" (A 73).

In such questionnaire, checkmarks were also made next to the figure "2," meaning "not quite satisfactory," next to the following four printed phrases thereon, and the following statements were typed in support thereof (Answer, Exhibit 1):

Subject Matter of Rating	Statement in Support of Rating
(a) Sympathetic interest in and understanding of children; ability to develop character and secure the respect and cooperation of pupils.	a. Applicant has not demo strated capacity for sustain insight into interests and abi ties of pupils. He does n draw pupils out but often dom nates the lesson and the pupi by his manner and his exce sive talk.
(b) Demonstrated ability to win and hold the respect of adults (co-workers, parents, etc.); tactfulness and resourcefulness in difficult situations; demonstrated ability in human relations.	b. Applicant in his dealin with his colleagues has not date won sufficient respect f his professional views when has offered them, for examp at departmental meetings. has not consistently displa tact in difficult situations. has not displayed ability in h man relations consistent w the position to which he aspir m. The applicant's colleag do not view him as a lead His interest in professional ma ters has not been sufficient positive to qualify him for t position to which he aspires.
(m) Leadership; extent to which applicant is regarded as a leader by his colleagues and the constructive value of his leadership.	
(n) Contribution to school's instructional program (curriculum development; preparation of instructional materials, etc.).	n. The applicant has not co tributed to curriculum develo ment or preparation of instru tional materials.

Previously, in June, 1967, Mr. Ryan made a "Report on Teacher Under Probationary Appointment," in which he rated the petitioner "Excellent" in the following (A 23):

"1. Personal appearance.

"2. Voice, speech, use of English.

"3. Professional attitude.

"4. Control of class.

"5. Maintenance of good relations with other teachers and with supervisors.

"6. Effort to establish and maintain good relationships with parents.

"7. Willingness to accept special assignments in connection with the school program."

Based on Mr. Ryan's above-quoted official report and rating of June, 1967, petitioner was given permanent tenure as a high school teacher after only one year of probationary service, without being required to serve a three-year probationary period (A 23).

Mr. Ryan also recommended the petitioner for appointment as a teacher of English in evening high schools and, upon such recommendation, petitioner was given such appointment (A 23).

Milton Nowak, Chairman of English Department in petitioner's high school, wrote the following commendations to petitioner (A 23-24):

> 1. "Dear Pat, Just a word of acknowledgment of the conscientious part you played in handling of the department cutting machinery during the fall term. You kept a firm control of the details and I had the sense that they were in good hands. Milton Nowak 6/26/67."
>
> 2. "Your lesson on Callaghan's story, 'The Snob' had substance and clearly engaged the attention and energies of English 122. * * * Not only was the class challenged to analysis of characterization and relationships, but it was held to high standards of oral and written expression. * * * "
>
> 3. "In the course of discussing the replies considerable exchange of views served to deepen insights into the story. Your experience as a teacher was reflected in your poise, in the assured manner with which you handled the many-faceted lesson, keeping it always in firm control. You set a fine model for these pupils in your own attractive speech and your friendly courteous manner. Milton Nowak, Chairman, 11/30/66."
>
> 4. "I take the occasion of the close of the school year to acknowledge gratefully your participation in a departmental panel on marking standards. The panel stirred us all to thought about our bases for marking. Milton Nowak, Chairman. 6/21/68."
>
> 5. "You wisely made it possible for all to profit from the lesson. Milton Nowak."

6. "Your manner with the pupils is commendable: sympathetic, tolerant, but not patronizing. Milton Nowak, Chairman of English, 11/30/67."

Petitioner claims that in rating his record, Mr. Ryan, and the Board of Examiners should have considered and given weight and effect to his professional activities and accomplishments in Mr. Ryan's school, from 1966 to 1968, which included the following (A 24-25):

1. "Teacher-in-charge, Fundamental Adult Education, Evening Adult School No. 156, Brooklyn, 1965-1968."

2. "Teacher of English as a second language, in evening adult school. 1949-1965."

3. "Delegate from my school to United Federation of Teachers."

4. "In charge of marking the objective part (Part I) of the Comprehensive Examination in English (Regents). In this work, I supervised teachers from the Speech Department, as well as teachers from the English Department."

5. "I have an M. A. degree in English and a professional diploma in teaching English; and I was elected to Kappa Delta Pi for achieving an A minus average in graduate school."

6. "Member of: National Council of Teachers of English; the New York City Association of Teachers of English; the Queensboro Council of Reading, affiliated with the International Reading Association, and New York Reading Council; New York Society for the Experimental Study of Education."

7. "I developed vocabulary material, based on 'Johnny Tremain,' which was distributed to all members of the English Department."

8. "As part of a departmental project, as a volunteer, I tutored senior high school students for the Comprehensive Examination in English (Regents)."

9. "As a volunteer, I tutored students, in composition of English, during my preparation period, for one school term."

Mr. Ryan mailed to petitioner a copy of the completed questionnaire. When he received such questionnaire, petitioner went to Mr. Ryan and asked (A 22):

"• • • why he made such report about me, in view of his action in rating me 'Excellent' in June, 1967, in his 'Report On Teacher Under Probationary Appointment,' and his action in rating me 'Satisfactory' for the school year ending June 30, 1967. Mr. Ryan said that such report was prepared by Milton Nowak, Chairman, English Department, and that in signing it, he relied largely on Mr. Nowak.

"Mr. Nowak had helped me to prepare for this examination. I asked Mr. Nowak why he helped me to prepare for this examination, and then prepared a report for Mr. Ryan which did not recommend me for such position. Mr. Nowak said that he did not think I would pass the examination and reach the 'Appraisal of Record' stage."

Criticisms and Commendations by School Principal William J. Freund.

On February 21, 1968, William J. Freund, Principal, Junior High School 16, Queens, in which petitioner served from 1948 to June, 1966 (and in which Mr. Freund be-

came the principal in 1956), completed and returned to the Board of Examiners a questionnaire concerning the petitioner, in which he checked the printed phrase: "I hesitate to recommend the applicant for the license" (Answer, Exhibit 7).

In that questionnaire, checkmarks were also made next to the figure "1," meaning "deficient," and next to the figure "2," meaning "not quite satisfactory," in certain printed phrases thereon, and the following statements were typed in support thereof (Answer, Exhibit 7):

Subject Matter of Rating	Rating No.	Statement in Support of Rating
(a) Sympathetic interest in and understanding of children; ability to develop character and secure the respect and cooperation of pupils.	1	a. Rejects and is rejected by pupils. It became necessary for assistant principal to screen in advance applicant's referrals to dean.
(b) Demonstrated ability to win and hold the respect of adults (co-workers, parents, etc.); tactfulness and resourcefulness in difficult situations; demonstrated ability in human relations.	1	b. Disruptive in dealing with adults; tactless.
(d) Integrity, conscientiousness in the performance of essential duties.	2	d. Cannot be relied upon. Needs frequent reminders and corrections.
(e) Initiative, creativity and resourcefulness in the fulfillment of duties.	2	e. Needs frequent prodding; rarely creative.

(f) Willingness to render service beyond the minimum required of teachers generally (visiting homes, extra help to pupils, assistance in the training of student teachers, etc.).	2	f. Does nothing more than that which has to be done.
(g) Willingness to cooperate with supervisors.	1	g. Refuses to accept suggestions.
(j) Soundness of judgment in appraising persons and proposals.	2	j. Is emotional and capricious in judgments, particularly when they involve adverse criticism.
(k) Achievement in school-community relations.	2	k. Inactive in community affairs.
(n) Contribution to school's instructional program (curriculum development; preparation of instructional materials, etc.).	2	n. Does not participate in developing instructional ideas or materials for school.

During petitioner's service under Mr. Freund's supervision, Mr. Freund rated the petitioner "Satisfactory" each year from 1956 to 1964 (A 36).

Mr. Freund, and Assistant to Principal Ross J. Wolf, gave the petitioner the following written commendations (A 39-44):

> 1. "I want you to know how fabulously well you have done in all of these (school and community activities), both as a person and as a true leader. I am * * * including this most high commendation in your personal file, so that it may stand you

in good stead, whenever the need arises. W. Freund, 6/14/63."

2. "Allow me to thank you for being so cooperative in coming the evening of the concert and assisting with the handling of so many of our pupils who performed. W. Freund, 4/17/64."

3. "Thank you and your student performers for the very interesting play that you presented as your share of the Christmas program this week in the eighth-grade assembly. R. Wolff, 12/13/57."

4. "Dear Pat: St. Patrick's Day program * * * one of the nicest we have had on the platform in a long, long time. I do hope this type of program sets the tone for other members of the faculty. W. Freund, 3/19/62."

5. "Dear Pat, Thanks very much for arranging the Music Festival of April 5, 1963. It was really a fabulous performance. Congratulations. W. Freund, 4/8/63."

6. "* * * the teacher, a perfect gentleman, sensitive to the rights of his pupils, aware of their need to develop an extensive vocabulary, has used this cooperative venture to launch an interest which covers both English and Social Studies. W. Freund, 4/30/58."

7. "I want to thank you for the splendid job you have been doing in organizing the English books and in distributing them to our department. R. Wolff 5/20/57."

8. "When you do things well you do them very well (School assembly program) W. Freund, 3/18/65."

9. "This lesson gives evidence of advance preparation (films, tapes, blackboard outlines, etc.). The teacher shows a great deal of familiarity with the life of Washington Irving and has a very good idea of what he wants to accomplish as an end result. W. Freund 5/25/61."

10. "P. Flynn Acting Asst Principal: St. Patrick Day's program: 'victory for good auditorium programs.' W. Freund 3/14/63."

11. "Using the students' background knowledge to guess at meanings, then checking with the dictionary, is good. R. Wolff 3/21/60."

12. "Providing opportunities for pupils to enrich their reading experiences is worth while. W. Freund 4/20/61."

13. "Congratulations on the fine job you and your students did in presenting the St. Patrick's Day Play. It is a very good example of the correlation of various language activities & their culmination in an activity that the rest of the school can share. R. Wolff 3/19/58."

14. "Miss Stack, Mr. Flynn.
Allow me to congratulate both of you for the excellent cooperation that your class had demonstrated in joining our PTA. W. Freund, 10/29/58."

15. "* * * the most wonderful & marvelous St. Patrick's Day performance in the world. I was deeply impressed. W. Freund 3/16/61."

16. "I want you to know how impressive the Honor Society Induction was. W. Freund 6/13/63."

17. "I want to thank you for your assistance in giving the make-up exam in reading. Your capable handling of the test was deeply appreciated. R. Wolff 2/28/58."

"18. * * * the voice and manner of the teacher, as well as class control, were highly commendable. W. Freund 5/6/59."

Petitioner claims that in rating his record, Mr. Freund and the Board of Examiners should have considered and given weight and effect to his professional activities and accomplishments during his service at Junior High School #16, Queens, which included the following (A 36-38):

1. setting up new school library program, which was inspected and commended by District Superintendent Max Rubenstein.

2. served as Chairman of English Language Arts program, without compensatory time release from classroom teaching duties for the hours of work beyond the normal school day, and with a full teaching schedule, and an official class.

3. implementing uniform mid-term examinations in English Language Arts.

4. setting up and recording conferences on reading skills and teaching of English Language Arts.

5. maintaining bulletin boards, and collecting and distributing books on the teaching of English Language Arts.

6. sponsoring the Future Teachers Club.

7. served as master teacher of several auditorium classes to implement television lessons in English Language Arts.

8. using classroom educational services of New York Herald Tribune to improve pupil reading skills, which dramatically improved reading scores of pupils.

9. served as teacher, and as teacher-in-charge of Fundamental Adult Education, 1949-1966.

10. served as teacher in Operation Second Chance, a Board of Education project designated to improve the education of adult welfare recipients.

Board of Examiners' standards and procedure in rating petitioner's record as a teacher.

Subdivisions 2 and 5 of Section 10 of the by-laws of the Board of Examiners prescribed the following standards and procedures for the rating of the record of teachers (A72, A64):

> "2. In the appraisal of record the Board of Examiners shall consider evidence of such elements of fitness as the following: loyalty to the government of the United States and good citizenship generally; traits of character and personality, such as integrity, conscientiousness in the performance of duty, capacity for winning and holding the respect and co-operation of fellow-workers and the community, sympathetic understanding of and interest in children, and capacity for developing the character and securing the respect and cooperation of pupils; * * *" (A 72).
>
> "5. * * * The term 'unsatisfactory' shall mean that the applicant is adjudged not fit for the license or position sought, in that he does not possess the traits, abilities and qualities subsumed under the term 'record' to the degree deemed by the Board

> of Examiners to be necessary or desirable for the effective performance of the duties pertaining to the license or position sought; * * *."

The Board of Examiners mailed the petitioner a notice to come to its office for an interview concerning his record. Such notice did not give him any information concerning the matters to be discussed at such interview, other than that such interview would be about his record (A 65).

Pursuant to such notice, petitioner went to the Board's office on December 11, 1968, where he was interviewed by a man and a woman, who did not tell him their names, and who asked him whether he had discussed with Messrs. Ryan and Freund the ratings they had given him in their questionnaires of March 7, 1968, and February 21, 1968 (A 65). Petitioner replied (A 65):

> "I said I had talked to Mr. Ryan who said that his rating report was prepared by Chairman of English Department Milton Nowak, and that in signing it he relied on Mr. Nowak; that Mr. Nowak helped me to prepare for this examination; that I asked Mr. Nowak why he helped me prepare for this examination, and then prepared a report for Mr. Ryan which did not recommend me for this position, and Mr. Nowak replied that he did not think I would pass this examination, and reach the 'Appraisal Of Record' stage."

Petitioner gave the following further account of this interview (A 66-67):

> "I also told these panelists that Mr. Nowak had given me many written commendations, and that Mr. Ryan had rated me 'Excellent' for permanent tenure purposes in 1967, as a newly appointed high school teacher of English completing a one

year probationary period, and in his annual performance ratings for 1966-1967, and for 1967-1968.

"I also told these panelists that Messrs. Freund and Wolff had given me many written commendations for my work from 1956 to 1964, and that Mr. Freund had given me 'Satisfactory' annual performance ratings from 1956 to 1964.

"These panelists said that such favorable ratings and commendations did not count in their rating of my record. This is confirmed in the Board of Examiners' 'Summary Statement Of Reasons For Dismissal Of Appeal On Unsatisfactory Record' (Answer, Exhibit 10, pars. 3-5).

"These panelists also asked me about an informal disciplinary conference with Assistant Superintendent Meagher in Mr. Freund's office * * *. I told these panelists that Mr. Freund's report to the Board of Examiners that at that conference Mr. Meagher said to me that:

"'failure to follow an order of an assistant to principal or of a principal would result in disciplinary action.'

"was not true; and that, instead, Mr. Meagher said to Mr. Freund:

"'If you think he is insubordinate, bring him up on charges,'

"and that Mr. Freund did not bring me up on charges. The report of this interview accepted Mr. Freund's version of this disputed fact, and it did not mention my version thereof (Answer, Exhibit 9, p. 1, par. D)

"The report of this interview further stated (Exh. 9, p. 2):

"'Many photo-copies of communications sent to Mr. Flynn by his supervisors were also considered.

They pointed out specific weaknesses, such as habitual lateness in arriving; irresponsibility in making out grades and recording them; refusal to accept 'emergency' assignment; quibbling over minor matters, failure to follow dismissal regulations, insensibility in dealing with students; lacking respect for his supervisors, etc.'

"At this interview, these panelists did not tell me about any of the so-called 'communications' allegedly sent to me concerning lateness; making out and recording grades; so-called 'emergency' assignments; failure to follow dismissal regulations; and lack of respect for supervisors. I did not know that such 'communications' had been sent to the Board of Examiners, and that these panelists were considering them. They did not ask me any questions about them, or tell me that they had such communications, contrary to their report that I said that I 'had been given copies of the documents upon which these ratings were based' (Exh. 9, p. 3). Messrs. Ryan and Freund did send me copies of their report of March 7, 1968, and February 21, 1968, to the Board of Examiners, but they did not send me copies of the 'communications' which they sent to the Board of Examiners to support their reports."

Pursuant to the Rules of the Board of Examiners, petitioner appealed to the Board of Examiners from its rating that his record as a teacher was unsatisfactory. The Board of Examiners denied such appeal (A 68-69).

Second rating that petitioner's record as a teacher is unsatisfactory, in examination for Assistant to Principal in Junior High Schools.

On August 5, 1969, without again interviewing the petitioner, or evaluating his record as a teacher, the Board of Examiners rated unsatisfactory the petitioner's rec-

ord as a teacher, in an examination for license and appointment as Assistant to Principal in Junior High Schools, in which petitioner had passed all the other parts of the examination. The Board wrote (A 100):

> "The applicant was interviewed in connection with his application for license as chairman of department of English in day high schools on December 11, 1968 and was denied license for unsatisfactory record on March 20, 1969. He was therefore found not fit similarly in the examination for license as assistant to principal in junior high schools on August 5, 1969.
>
> "The Board of Examiners concluded the reasons for finding the applicant not fit for the license of chairman of an English department applied with equal cogency and force to his application for license as assistant to principal in junior high schools."

Legal proceedings in courts below.

On November 21, 1969, petitioner commenced the first of two proceedings under Article 78 of the New York Civil Practice Law and Rules to review and annul the determination of the Board of Examiners on March 20, 1969, that his record as a teacher was unsatisfactory in the examination for license and appointment as Chairman of Department in high schools, index number 20,815-1969, Kings County, New York.

On May 25, 1970, petitioner commenced the second such proceeding to review and annul the determination of the Board of Examiners on August 5, 1969, that his record as a teacher was unsatisfactory in the examination for license and appointment as an assistant to principal in junior high schools, index number 8459-1970, Kings County, New York.

Both proceedings were argued and submitted at the same time to the Special Term of the New York Supreme Court which dismissed both petitions without a trial. Judgment dismissing the first petition was entered on January 5, 1971. Judgment dismissing the second petition was entered on February 18, 1971.

On June 14, 1971, the Appellate Division, Second Department, of the New York Supreme Court, entered an order (one paper) which affirmed the two judgments dismissing the petitions in each said proceeding.

On February 17, 1972, the Court of Appeals of the State of New York entered an order (one paper) which dismissed two appeals taken by petitioner from the aforesaid order of the Appellate Division entered on June 14, 1971.

Presentation of the Federal Questions.

The federal constitutional questions were raised in an affidavit submitted by petitioner in support of his petition (A 65-69). Petitioner argued such constitutional questions in his briefs to the Special Term of the New York Supreme Court, to the Appellate Division of the New York Supreme Court, and to the Court of Appeals of the State of New York.

Reasons for Granting the Writ.

1. (a) Due process in this case required the Board of Examiners to inform the petitioner of the reasons for its proposal to rate unsatisfactory the petitioner's record as a teacher, and to give him an opportunity to present evidence under oath at a hearing thereon, and to cross examine witnesses at such hearing.

In *Greene v. McElroy*, 360 U. S. 474, 508 (1958), it was decided that a governmental limitation of a citizen's work opportunities can be made only after a fair hearing in which he has an opportunity to confront and to cross examine witnesses who testify against him.

In *Cafeteria Workers v. McElroy*, 367 U. S. 886 (1961), the court said that notice and hearing were not required upon a commanding officer's exclusion from a naval installation of a cook employed by a contractor, because such exclusion did not bar such cook from obtaining any other available employment as a cook, including employment at any other governmental installation; and that, consequently, such limited exclusion from employment at a single naval installation:

> "* * * makes this case quite different from that of the lawyer in *Schware, supra*, the physician in *Dent, supra*, and the cook in *Raich, supra*" (367 U. S. at 896).

The court further said (367 U. S. at 898-899):

> "* * * this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity * * * There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else."

Several Federal Courts of Appeals have applied the above-quoted principles enunciated in the *Cafeteria Workers* case in deciding that state employees have a federal constitutional right to procedural due process of law, including notice and a hearing, where their dismissal or non-retention in employment by a state was made for reasons which damaged their reputation, or

otherwise impaired their opportunities for employment in their profession or occupation, in or out of the government service. *Birnbaum v. Trussell*, 371 F. 2d 672 (C. A. 2, 1966); *Kletschka v. Driver*, 411 F. 2d 436 (C. A. 2, 1969); *Taylor v. New York City Transit Authority*, 433 F. 2d 665 (C. A. 2, 1970); *Meredith v. Allen County War Memorial Hospital*, 397 F. 2d 33 (C. A. 6, 1968); *Roth v. Board of Regents*, 446 F. 2d 806 (C. A. 7, 1971); *Schirck v. Thomas*, 447 F. 2d 1025 (C. A. 7, 1971); *Drown v. Portsmouth School District*, 435 F. 2d 1182 (C. A. 1, 1970); *Sinderman v. Perry*, 430 F. 2d 939 (C. A. 5, 1970), certiorari granted 403 U. S. 917 (1971).

In *Greene v. McElroy, supra*, 360 U. S. 474, 497, the court said:

> "• • • where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

This constitutional principle of procedural due process applies whenever governmental action depends upon a governmental administrative determination of disputed factual issues.

In *Willner v. Committee on Character and Fitness*, 373 U. S. 96, 103, 104, 105 (1963), the court said:

> "• • • procedural due process often requires confrontation and cross examination of those whose word deprives a person of his livelihood • • •
> "We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this • • •

> "Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division."

In *Goldberg v. Kelly*, 397 U. S. 254, 262-263 (1969), the court said:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' • • • and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

Termination of employment in the civil service of a state or denial of re-employment to a non-tenured civil service employee of a state has been deemed a serious and important interest of a teacher or other civil service employee of a state, to which protection should be given by constitutional due process procedures, where the employee has devoted many years to employment in the civil service, during which he has established a reputation for efficiency and integrity which would be impaired by his dismissal, or by other arbitrary action. *Birnbaum v. Trussell, supra,* 371 F. 2d 672 (C. A. 2, 1966); *Kletschka v. Driver, supra,* 411 F. 2d 436 (C. A. 2, 1969); *Roth v. Board of Regents, supra,* 446 F. 2d 806 (C. A. 7, 1971).

Petitioner was deprived of his constitutional right to procedural due process by the actions of the Board of Examiners in failing to give him advance notice of the reasons for its proposal to rate unsatisfactory his record as a teacher. The Board failed to inform the petitioner of its reasons for its proposal to rate unsatisfactory his record as a teacher. Instead, it gave him a bare notice to come for an interview about his record, with-

out telling him about any specific derogatory allegation concerning his record as a teacher.

The assistant examiners who interviewed the petitioner reported that petitioner "had been given copies of the documents on which these ratings were based" (A 67). Petitioner denied this, and swore that (A 67-68):

> "Messrs. Ryan and Freund did send me copies of their reports of March 7, 1968, and February 21, 1968, to the Board of Examiners, but they did not send me copies of the 'communications' which they sent to the Board of Examiners to support their reports."

(b) In its brief in the New York Appellate Division, the respondent said (p. 16):

> "* * * unlike the cases cited by petitioner, here there are no specific factual issues upon which the Board of Examiners' determination hinges. It is true that he disputed before the Board, in some minor way, a few of the incidents, described in the supporting data. But a trial is hardly the appropriate vehicle for determining the basic issue here: whether petitioner's record, over many years, is a superior one so as to show fitness for the more responsible and sensitive position."

By its above-quoted statement, the respondent sought to base its determination that petitioner's record as a teacher was unsatisfactory upon an undefined standard whether his record was "superior" as to matters other than the alleged factual "incidents described in the supporting data." This argument is self-defeating. If the respondent decided that petitioner's record as a teacher was unsatisfactory, without deciding the factual disputes concerning "incidents described in the supporting data," then there was no factual basis for its determination.

in which case such determination should be annulled for lack of substantive and procedural due process in making such determination without any factual basis therefor.

Actually, there were important factual issues which the respondent should have determined as an indispensable factual basis for its determination that petitioner's record as a teacher was unsatisfactory.

At the outset, there is a factual question whether his former principal, Mr. Freund, was biased and prejudiced against the petitioner, because petitioner served as a shop steward of the Teachers' Union, and he made and presented several grievances in which he complained that Mr. Freund violated the collective bargaining contract by assigning additional duties to teachers in violation of the collective bargaining contract, and by failing to assign additional duties on a roster rotation basis; and he won a grievance appeal, which sustained his contentions (A 46-47). Mr. Freund submitted an affidavit herein, in which he did not deny, dispute or discuss these matters (A 76).

There is also a factual question whether another principal, Mr. Ryan, rated the petitioner in good faith by signing his name to a rating prepared by Milton Nowak, Chairman of English Department (A 65); and when petitioner asked Mr. Nowak why he helped petitioner prepare for this examination and then prepared a report for Mr. Ryan which did not recommend the petitioner for the position, Mr. Nowak replied that he did not think the petitioner would pass this examination, and reach the "Appraisal of Record" stage (A 65). Messrs. Ryan and Nowak did not submit any affidavit denying or explaining these statements by the petitioner.

There are also factual questions concerning the weight and credibility which the respondent should give to unfavorable reports concerning the petitioner, made in 1968 by principals Ryan and Freund, in view of the contrary satisfactory ratings and numerous fulsome commendations which those same principals gave to the petitioner for many years preceding 1968 (A 23-24, A 39-44). Mr. Freund's affidavit (A 76-77) did not discuss or explain such satisfactory ratings and commendations and Mr. Ryan made no affidavit in this case.

There are also factual questions whether the petitioner violated any by-law or directive by going direct to a grievance hearing on October 30, 1964, instead of coming to his school first (A 46-47); whether petitioner knew that Mr. Freund had designated Mr. Kessler as Acting Dean (A 47); whether petitioner violated any by-law or directive by absenting himself from school to take a civil service examination (A49-50); whether petitioner left the school auditorium on January 27, 1965, before his class had left the auditorium (A 50); whether he violated any directive on March 31, 1965, by telling a pupil he would meet his mother "in 309 where I was completing other professional activities" (A 51); whether petitioner properly referred a pupil, Harry Wright, for disciplinary action (A 51); whether he wrote an unsigned memorandum concerning "incident on T. Ebrone," and whether he made a proper disciplinary referral of a pupil, Blossom McLaughlin (A 52-53); whether petitioner properly declined to cover a class whose teacher, Mr. Nowak, had left the class to accompany certain pupils to an award ceremony, and whether it was petitioner's turn on the rotation roster to perform this additional duty (A 55-56); and whether District Superintendent Meagher said that petitioner's alleged "failure to follow an order of an assistant to principal would result in disciplinary action," as claimed by Mr. Freund, or whether Mr.

Meagher said "If you think he is insubordinate, bring him up on charges," as claimed by petitioner (A 56-57).

(c) The petitioner also had a constitutional right to substantive due process of law in the rating of his record as a teacher, in the sense that the Board of Examiners could not make an arbitrary determination that the petitioner's record as a teacher was unsatisfactory, contrary to the facts, without any basis in fact, or contrary to applicable statutes and regulations.

In *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952), the court said:

> "* * * constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1950), the court said:

> "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

See, also:

Cramp v. Board of Public Instruction, 368 U. S. 278 (1961);
Torcaso v. Watkins, 367 U. S. 488 (1960);
Slochower v. Board of Higher Education, 350 U. S. 551 (1955).

2. The by-laws of the Board of Examiners define an "unsatisfactory" rating of a teacher's record as follows (A 64):

> "The term 'unsatisfactory' shall mean that the applicant is adjudged not fit for the license or

> position sought, in that he does not possess the traits, abilities and qualities subsumed under the term 'record' *to the degree deemed by the Board of Examiners to be necessary or desirable for the effective performance of the duties pertaining to the license or position sought;* * * *." (Italics supplied.)

The above-quoted by-law is unconstitutionally vague. It gives to each member of the Board of Examiners uncontrolled power to determine for himself, by his own individual standard, whether an applicant had the requisite traits, abilities and qualities to a degree which each member of the Board of Examiners "deemed * * * to be necessary or desirable." This is wholly subjective, and provides no objective standard whatever for evaluating and rating an applicant's record as a teacher.

In *Matter of Cohen v. Fields*, 298 N. Y. 235, 241, the court annulled a by-law which provided that the Board of Examiners could rate an applicant's record "insufficiently meritorious." The court said that the by-law:

> "leaves an examiner at liberty to appraise the records of applicants in accordance with standards peculiar to the examiner himself, contrary to the Constitution."

After the *Cohen* case was decided, the Board of Examiners amended its by-laws by substituting "Unsatisfactory" for "Insufficiently Meritorious." This change in words made no change in substance. It left each member of the Board of Examiners

> "at liberty to appraise the records of applicants in accordance with standards peculiar to an examiner himself,"

which was held unconstitutionally vague in *Cohen v. Fields, supra,* 298 N. Y. 235.

3. An examination of an applicant for employment or promotion should

> "bear a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs v. Duke Power Company,* 401 U. S. 424 (1970).

See, also:

Chance v. Board of Examiners, F. Supp. (D. C. N. Y., 1971), affd. F. 2d (C. A. 2, 1972);
United States v. Jacksonville Terminal Company, 451 F. 2d 418, 456 (C. A. 5, 1971);
Colbert v. H-K Corporation, 444 F. 2d 1381 (C. A. 5, 1971).

The Board of Examiners never made any study of the relationship between its "Appraisal of Record" test, and "successful performance of the jobs for which it was used."

The qualities or matters sought to be ascertained and rated in the "Appraisal of Record" test were defined in the by-laws as (A 72):

> "* * * loyalty to the government of the United States and good citizenship generally; traits of character and personality such as integrity, conscientiousness in the performance of duty, capacity for winning and holding the respect and cooperation of fellow workers and the community, sympathetic understanding and interest in children, and capacity for developing the character and securing the respect and cooperation of pupils."

These are all broad generalities, which concern themselves mainly with an applicant's character and personality. They do not provide a sufficient factual basis for predicting an applicant's "successful performance" of the job he seeks. Therefore, the "Appraisal of Record" test is invalid under the cases cited above.

4. The Board of Examiners was required to provide an impartial decision maker, instead of giving the power of decision to school principals whom it employed as assistant examiners to interview the petitioner, and to rate his record.

The Board of Examiners employed two school principals as panelists to rate the petitioner's record. These panelists did not act impartially. Their report and rating of petitioner's record shows that they were biased and prejudiced against the petitioner, and in favor of their fellow principals, Walter Freund and Donald Ryan. They accepted and reported Mr. Freund's version of a disciplinary interview of the petitioner by Mr. Freund and by Assistant Superintendent Cormac Meagher, and they did not even report that petitioner disputed Mr. Freund's version, and gave a different account of this disciplinary interview (A 66-67). They also failed to report that petitioner told them that Mr. Ryan admitted to petitioner that he did not prepare the March 7, 1968, rating of the petitioner which he sent to the Board of Examiners, and that he signed such rating in reliance on Milton Nowak, Chairman of English Department, who prepared such report (A 65-66); and that Mr. Nowak told the petitioner (A 65):

> "* * * he did not think I would pass this examination, and reach the 'Appraisal of Record' stage,"

even though he helped the petitioner prepare for this examination (A 65).

The Board of Examiners was required to provide an impartial decision maker, instead of giving the power of decision to persons whose status as principals gave them a community of interest in sustaining ratings made by other principals, particularly where the raters cited disciplinary incidents as the basis for rating the petitioner unsatisfactory.

Pursuant to the Rules of the Board of Examiners, petitioner filed an "appeal" to the Board of Examiners from the "unsatisfactory" rating given him by the Board of Examiners upon the report of the two panelists that his record was unsatisfactory. Such "appeal" was decided by the same members of the Board of Examiners who previously approved the report of the two panelists that petitioner's record was unsatisfactory. Therefore, such "appeal" was invalid, because it was not an impartial determination by persons who did not participate in making the determination being appealed.

In *Goldberg v. Kelly*, 397 U. S. 254, the court said:

> "And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U. S. 133 (1955). *Wong Yang Sung v. McGrath*, 339 U. S. 33, 45-46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the decision under review."

See, also:

> *Escalera v. New York City Housing Authority*, 425 F. 2d 853 (C. A. 2, 1970).

CONCLUSION.

The petition for certiorari should be granted.

May 4, 1972.

Respectfully submitted,

MORRIS WEISSBERG,
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New York, N. Y. 10038
212 964 0492.

APPENDIX A.

New York Education Law §2569.

§2569. Board of examiners

1. In a city having a population of one million or more there shall be a board of examiners to consist of five members, one of whom shall be the superintendent of schools of the city school district of the city of New York or a deputy superintendent thereof designated by him to act in his stead during his pleasure. No person other than the chancellor, the superintendent of schools, or a deputy superintendent so designated shall, while in the supervising or teaching service of the city, serve on such board. It shall be the duty of the board to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists, subject to the responsibilities among the members of the board of examiners hereinafter set forth. The board shall periodically review the validity and reliability of examinations as well as examination procedures. It shall hear and determine such appeals as may be authorized by it. It shall perform such other duties as the board of education and the chancellor of said city school district may require. Each member of the board (other than the chancellor or his designee), beginning with the senior member of the board, shall serve as chairman thereof, in rotation, for a period of one year. In addition to his other duties as an examiner, he shall, in accordance with the policies of the board of examiners, be responsible for the administration of the examining function. He shall supervise the board's examining and administrative staffs, and the

preparation of the board's annual budget requirements. Should a vacancy occur in the office of the chairman, the next senior member of the board shall fill the unexpired term. If such vacancy is for an unexpired term of more than six months, such member shall not serve as chairman for the year following. The board of examiners may employ temporary assistants at a compensation fixed by the board of education; provided, however, that on and after February sixteenth, nineteen hundred seventy, no person shall be employed as a temporary assistant unless nominated or approved by the chancellor or by a superintendent of schools of a community school district of the city of New York.

2. An eligible list of candidates for appointment as member of the board of examiners shall remain in force for four years from the date of its promulgation. Prior to the expiration of said list, the board of education may request the civil service commission or body which created said list to continue said list for a period of two years, and said civil service commission shall grant such request. Said civil service commission may, upon like request made prior to the termination of said two years, continue said list for a further period of two years.

APPENDIX B.

Opinion of Damiani, J.

Petitioner, a candidate in an open competitive examination for license as Chairman of English in Day High Schools, seeks in this Article 78 proceeding to review and annul the respondent's determination which refused to grant him a license because his record was not satisfactory.

Respondent in opposition contends that petitioner's record evidenced by the reports of school principals warranted its determination that petitioner's record was unsatisfactory to meet the requirements for the position.

Petitioner contends *inter alia* (1) that respondent in rating him as it did breached a collective bargaining contract entered into by the Board of Education of the City of New York and the Teacher's Union and the Board of Education's resolutions pertinent thereto, in that it was improper for respondent to consider derogatory statements made against him which were not in his official personal file and copies of which he claims were not given him; (2) that the derogatory statements were made in bad faith due to bias and prejudice against him and such statements were contrary to the facts, without basis in fact, and wholly arbitrary since the same individuals had previously rated him "satisfactory", aided in preparing him for the subject examination, and commended him in the past for his teaching abilities. He also questions the right of the respondent to consider the letters, written reports and data from school principals and other personnel with whom petitioner had contact and where he taught during the past years, and objection is also made to respondent's issuance of a questionnaire to the school principals with the request for their appraisal of petitioner's "demonstrated abilities with reference to his probable success in the position for which he seeks a license • • • for the period between September 1966 and the present (February 1968)."

After considering all the submitted papers, the court is of the opinion that respondent's actions were in all respects proper and it performed its duty as mandated by section 2569 of the Education Law and section 10 (1), (2) and (4) of the by-laws of the Board of Examiners.

Section 10 (1) of the respondent's by-laws provides that it:

> "shall refuse to recommend the issuance of license or certificate to an applicant whose record is adjudged 'unsatisfactory' as defined in subdivision 5 below."

Subdivision 5 of this section provides in part:

> "* * * The term 'Unsatisfactory' shall mean that the applicant is adjudged not fit for the license or position sought, in that he does not possess the traits, abilities, and qualities subsumed under the term 'record' to the degree deemed by the Board of Examiners to be necessary or desirable for the effective performance of the duties pertaining to the license or position sought; * * *."

Section 10 (2) of the by-laws provides:

> "In the appraisal of record the Board of Examiners shall consider evidence of such elements of fitness as the following: * * * traits of character and personality, such as integrity, conscientiousness in the performance of duty, capacity for winning and holding the respect and cooperation of fellow-workers and the community, sympathetic understanding of and interest in children, and capacity for developing the character and securing the respect and cooperation of pupils; and, in the case of applicants who have rendered service relevant to the license or position sought, the ability

to maintain a satisfactory degree of competence in the performance of such service, * * *."

Section 10 (4) of the by-laws provides:

"In the process of appraising record, the Board of Examiners shall avail itself of official reports or other data on file with the Board of Education * * * . The Board of Examiners may also inquire into the records of applicants by requesting * * * school officials, supervisors, employers, and others to furnish reports concerning applicants on appropriate forms approved by the Board of Examiners, and may supplement such means of inquiry by correspondence, by interview with the applicant, or by personal investigation. Such inquiry may also extend to other evidence concerning the * * * character, personality, and quality of service of the applicants."

These by-laws authorized respondent to make inquiry into the petitioner's record insofar as it had to do with individuals he came in contact with as a teacher. Such record shows, *inter alia,* that the returned formal questionnaire not alone contained unfavorable reports, but in addition each principal checked that part of the questionnaire which stated, "I hesitate to recommend the applicant for this license." (Respondent's Ex. 1 and 7, p. 3, par. 8[2]). In the court's view the supporting data accompanying the principal's reports was sufficient evidence upon which the respondent bases its determination. No evidence is submitted wherein the court may determine that the reports submitted to the respondent were tainted with bias or prejudice. It is clear from the submitted papers that the determination that petitioner's record is unsatisfactory is supported by evidence from which an inference of the fact may reasonably be drawn. Under these circumstances the court may not disturb the respondent's determination (*Bar-*

nett v. Fields, 196 Misc. 339, affd. 276 App. Div. 903, affd. 301 N. Y. 543).

Nothing is presented in the submitted papers to indicate that respondent's determination was arbitrary or illegal. The contention of petitioner concerning the collective bargaining agreement between the Board of Education and his Union is of no consequence. The Board of Examiners, being an entity apart from the Board of Education, and not a party to the contract, is not bound by its terms. The petition is accordingly dismissed.

Settle order on notice.

Flynn, Jr. v. Board of Examiners of the Board of Education—This companion motion by petitioner relating to an examination for a license as assistant principal in junior high schools is dismissed as academic in view of the court's decision on the petitioner's prime motion decided simultaneously herewith.

Settle order on notice.

APPENDIX C.

Judgment of Supreme Court, Kings County, Dated January 4, 1971.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, in the Supreme Court Building, Civic Center, Montague Street, in said County on the 4th day of January, 1971.

Present:

Hon. Vincent D. Damiani
Justice.

IN THE MATTER

of

The Application of PATRICK FLYNN, Jr.,

Petitioner,

for a judgment pursuant to Article 78, CPLR,

against

BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

Index No. 20815/69

Petitioner having moved this Court pursuant to Article 78 of the Civil Practice Law and Rules for a judgment (1) Reviewing and annulling the rating made by the Board of Examiners on March 20, 1969, that the

petitioner's record was unsatisfactory, in the open competitive examination for license as Chairman of Department of English in Day High Schools, (2) In the alternative, directing a trial of any triable issue raised by the pleadings and proofs of the parties, (3) For such other, further or different relief as may be just and proper, and said application having regularly come on before me to be heard

Now, upon reading and filing the notice of motion dated November 21, 1969, the petition verified November 21, 1969, the reply verified June 16, 1970, the affidavit of petitioner sworn to June 16, 1970, all submitted in support of the application; the answer of respondent verified February 10, 1970 and the ten exhibits annexed thereto, the affidavit of Paul Denn sworn to February 13, 1970, the affidavit of Walter J. Freund sworn to February 16, 1970 all submitted in opposition thereto; and after hearing Morris Weissberg, Esq., attorney for petitioner, in support of the application, and J. Lee Rankin, Esq., Corporation Counsel, attorney for respondent, by Peter J. Flanagan, Esq., of counsel, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the Court,

Now, on motion of J. Lee Rankin, Corporation Counsel, attorney for respondent it is

ORDERED, that petitioner's application be and the same is hereby denied, and it is

ADJUDGED, that the petition be the same is in all respects dismissed without costs.

Enter

V. D. D.
J. S. C.

APPENDIX C.

Judgment of Supreme Court, Kings County, Dated February 17, 1971.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Kings, at the County Courthouse in said County, on the 17th day of February, 1971

Present:

Hon. Vincent D. Damiani,
Justice.

In the Matter

of

The Application of Patrick Flynn, Jr.,

Petitioner,

for a judgment pursuant to Article 78, CPLR,

against

The Board of Examiners of the Board of Education of the City of New York,

Respondent.

Index No. 8459—1970

The above named petitioner having made a motion for a judgment pursuant to Article 78, CPLR, reviewing and annulling the rating made by the Board of Examiners on March 20, 1969, that the petitioner's record was unsatisfactory, in the open competitive examination for license as Assistant to Principal in Junior High Schools, and for other relief, and the said motion having duly come on to be heard,

Now, upon reading and filing the notice of petition herein, dated May 25, 1970, the petition, verified on May 25, 1970, and the stipulation, dated November 19, 1970, and petitioner's affidavit, sworn to on June 16, 1970, and filed in another proceeding in this court between the same parties herein, bearing index number 20815—1969, with proof of service of copies of all thereof upon the respondent or its attorney, all in support of the said motion, and the answer of the respondent, verified on November 17, 1970, with Exhibits Nos. 1-10 annexed thereto, the copy of the affidavit of Paul Denn, sworn to on February 13, 1970, and the affidavit of Walter J. Freund, sworn to on February 16, 1970, in opposition to the said motion, and after hearing Morris Weissberg, attorney for the petitioner, in support of the said motion, and J. Lee Rankin, Corporation Counsel (Peter J. Flanagan, of counsel), attorney for respondent, in opposition thereto, and due deliberation having been had, and upon the opinion and decision of the Court filed herein, it is

ORDERED that the said motion be, and the same is hereby in all respects denied; and it is further

ORDERED AND ADJUDGED that the petition be and the same is hereby dismissed without costs.

Enter:

V. D. D.
J. S. C.

ANTHONY N. DURSO
Clerk

Granted Feb 17 1971
ANTHONY N. DURSO
Clerk

Filed 1971 Feb 18, 1971
Kings County Clerk's Office

APPENDIX D.

Appellate Division Order, Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 14, 1971

Hon. James D. Hopkins
Acting Presiding Justice
Hon. M. Henry Martuscello
Hon. J. Irwin Shapiro
Hon. Frank A. Gulotta
Hon. A. David Benjamin
Associate Justices

In the Matter
of

Patrick Flynn, Jr.,

Appellant,

v.

The Board of Examiners of the Board of Education of the City of New York,

Respondent.

In the above entitled cause, the above named Patrick Flynn, Jr., petitioner, having appealed to this court from two judgments of the Supreme Court, Kings County.

dated January 4, 1971 and February 17, 1971, respectively; the said appeals having been argued by Morris Weissberg, Esq., of counsel for the appellant, and by Bernard Burstein, Esq., of counsel for the respondent; due deliberation having been had on said appeal, and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgments appealed from are hereby unanimously affirmed, without costs.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX E.

Order Granting Motion to Dismiss.

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of February A. D. 1972.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

2 Mo. No. 106

IN THE MATTER

of

The Application of PATRICK FLYNN, JR.,

Appellant.

For Judgment &c.

vs.

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeals taken by the appellant in the above cause to this Court and

papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeals dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is presented.

A copy

GEARON KIMBALL
Deputy Clerk

FILE COPY

(40601)

FILED
JUN 16 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No. 71-1467

In the Matter of the Application of
PATRICK J. FLYNN, JR.,

Petitioner,

For a Judgment pursuant to Article 78 of N. Y. CPLR,

—against—

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court

BRIEF IN OPPOSITION

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STANLEY BUCHSBAUM,
BERNARD BURSTEIN,
of Counsel.

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Diamond v. Fields, Matter of, 303 N. Y. 776 (1952) 18

Goldberg v. Kelly, 397 U. S. 254 (1970) 13, 16

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Hannah v. Larche, 363 U. S. 420 (1960) 13, 14

Healy, Matter of, 8 N Y 2d 1137 (1960) and 8 N Y 2d 710 (1960) 2

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Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54 (1934) 3

Madera v. Bd. of Educ. of City of New York, 386 F. 2d 778 (2d C., 1967) cert. den. 390 U. S. 1028 (1968) 13

Miller Cornwall R. Co., 168 U. S. 131 (1897)..... 4

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1467

In the Matter of the Application of
PATRICK J. FLYNN, JR.,

Petitioner,

For a Judgment pursuant to Article 78 of N. Y. CPLR,

—against—

THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court

BRIEF IN OPPOSITION

Jurisdiction

Respondent challenges jurisdiction on two grounds.

1.—28 U.S.C. 1257 (3), which petitioner invokes, permits review only of "final judgments or decrees rendered by the highest court of a state *in which a decision may be had,* • • •." There was no compliance with that provision.

After the dismissal of this proceeding was unanimously affirmed by the Appellate Division of the N. Y. Supreme Court, the petitioner was entitled to appeal to the N. Y. Court of Appeals as of right if the proceeding "directly involved the construction of the constitution of the State or the United States" (N. Y. CPLR 5601 [b] 2), or, in the absence of a substantial constitutional question, to appeal by obtaining permission from either the Appellate Division or the Court of Appeals (N. Y. CPLR 5602 [a]). The petitioner appealed as of right, under CPLR 5601 (b) 2, invoking *inter alia* a constitutional ground. That appeal was dismissed on the ground that the constitutional question was not "substantial" (30 N Y 2d 587).

Petitioner had also raised non-constitutional issues here, e.g., that the administrative determination was arbitrary and capricious as a matter of state law (N. Y. CPLR 7803). A favorable determination on this state issue would have resulted in judgment in his favor without necessity of reaching any constitutional issue. After the dismissal of the "constitutional" appeal, the petitioner could have sought discretionary leave to appeal to the Court of Appeals, under CPLR 5602, to raise the non-constitutional issues. Dismissal of an appeal, improperly taken as of right, does not bar a subsequent application to the Court's discretion (CPLR 5514). See e.g. *Matter of Healy,* 8 N Y 2d 1137 (1960) and 8 N Y 2d 710 (1960); *Temple* v. *Liebmann,* 7 N Y 2d 1049 (1960) and 8 N Y 2d 709 (1960).

Where there is a further opportunity to obtain appellate review in the state courts, as, for instance, by seeking discretionary leave to appeal, an application must be made to such relief as a condition to invoking 28 U.S.C. 1257 (3). See STERN and GRESSMAN, *Supreme Court Practice*, § 3.21; *Gotthilf* v. *Sills*, 375 U. S. 79 (1963); *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186 (1925); *Banks* v. *California*, 395 U. S. 768 (1969), *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969).

2. Jurisdiction to review state court decisions in this court is limited to the "federal questions" properly raised in the state courts. STERN and GRESSMAN, *op. cit.*, 3.25, 3.30. *Whitney* v. *California*, 274 U. S. 352, 362-363 (1926); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1945); *Newsom* v. *Smyth*, 365 U. S. 604 (1960). None of the four "Questions Presented" (Pet., pp. 3-4) were adequately raised in the "record" in the state courts (i.e., the petition or the supporting affidavits).

Petitioner, in his petition, raised only two issues, both under state law i.e., (1) that the Board's action violated a collective bargaining agreement, and (2) that the determination was contrary to the facts and arbitrary. These were the only issues discussed in the N. Y. Supreme Court's opinion (App. B to Petition). Brief and oral arguments in the state courts are not part of the record and cannot be used to establish that a "federal question" was raised. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 (1934).

On appeal, petitioner briefed these, and two other, contentions: (1) that the By-laws of the Board of Examiners violated Article V, section 6, of the New York Constitution, and (2) that the procedure employed violated

"due process", without indicating specifically that he was invoking the "due process" clause of the United States Constitutions. (Article I § 6 of the New York Constitution provides "No person shall be deprived of life, liberty or property without due process of law.") The Appellate Division affirmed without an opinion. Petitioner raised these arguments in a brief to the Court of Appeals. That appeal was dismissed as not raising a "substantial" constitutional question, without any other discussion.

Petitioner's Question 2 (regarding the validity of the By-Laws of the Board) was raised in the appeal briefs, but it was argued solely as a claimed violation of Article V, § 6, of the *State* Constitution. Question 3 (regarding the claim that the examination was unrelated to the position sought) was *never* raised before, either in the Record on Appeal or in the briefs.

Petitioner's Questions 1 and 4 ("due process" arguments) were raised in the state courts on appeal, but there was no specific reference to the United States Constitution as distinct from the New York Constitution. The presumption in such cases is that it is the state constitution that is invoked. *Bowe* v. *Scott*, 233 U. S. 658, 664-665 (1913); *Miller Cornwall R. Co.*, 168 U. S. 131, 134 (1897). STERN and GRESSMAN, *op. cit.* § 3.26.

Thus there would appear to be no jurisdiction to review any of the four issues now sought to be raised here. In any event, it is plain that there is no jurisdiction to review the two issues other than due process (Questions 2 and 3).

Questions Presented

At most, the two questions of "due process" are presented here:

1. In determining that petitioner's record in the school system was "unsatisfactory" to establish fitness for promotion to a supervisory position, did the Board of Examiners deny him procedural due process where (1) he was provided, at the outset, with all the materials used in the evaluation, (2) given two hearings at which he had an opportunity to respond to negative evaluations and to offer proof of positive achievements, (3) given a full statement of reasons for the Board's action, and, (4) given an opportunity to obtain review of the Board's decision in the state courts or before the N. Y. State Commissioner of Education?

2. Was the use of a panel of school principals, on assignment to the Board of Examiners, to hear petitioner's rebuttal evidence and to report and make recommendations to the Board of Examiners, unconstitutional as a denial of an impartial decision maker (allegedly because they were school principals) where there was no allegation that the panel was personally familiar with those other principals who had submitted evaluations of petitioner and where there was a subsequent full hearing before the Board of Examiners?

Statement of Facts

(1)

Petitioner, a teacher, failed two Civil Service competitive examinations, one for promotion to "Chairman of Department of English in the High Schools" and one for "Assistant to the Principal in the Junior High Schools".

The examinations consisted of several parts. Petitioner passed a written test, an oral interview, a teaching test, an English proficiency examination, but he failed each examination because of an "unsatisfactory" rating upon an appraisal of his record.

The "appraisal of record" has been used, as it was here, for over 20 years. The Board sends detailed questionnaires to the principals of every school where an applicant has been employed. The principal ("official rating officer") is directed to "appraise the applicant's demonstrated abilities with reference to probable success in the position for which he seeks a license".

Here, reports were received from Walter J. Freund, principal of Intermediate School 61-Q, where petitioner taught from September 1948 to March 1966, and from Donald J. Ryan, principal of William Cullen Bryant High School, where petitioner taught from September 1966 till March 7, 1968 (the date of the rating). The principals were asked to compare the applicant with others on the same level and judge him with respect to 14 specific qualities or traits, on a scale of 1 to 5, (5—Superior, 4—good, 3—satisfactory, 2—not quite satisfactory, 1—deficient). If they felt they did "not have the information necessary to record a rating," they could decline to do so. Wherever a rating was below "3", the rating officer was required to substantiate that rating with supporting evidence. (Resp. Exhs. 1 and 7).

Mr. Freund rated petitioner "satisfactory" on five of the fourteen personal and professional qualities or traits, "not quite satisfactory" as to six, and "deficient" as to three. Mr. Ryan rated him "good" as to three, "satisfactory" as to seven, and "not quite satisfactory" as to four.

Both principals, similarly and independently, gave petitioner poor ratings in "Demonstrated ability to win and hold the respect of adults [co-workers, parents, etc.]"; tactfulness and resourcefulness in difficult situations; and, in "demonstrated ability in human relations". Mr. Freund described him as "disruptive in dealing with adults; tactless" and Mr. Ryan wrote: "Applicant in his dealings with his colleagues has not to date won sufficient respect for his professional views when he has offered them, for example, at departmental meetings", and "has not consistently displayed tact in difficult situations" or "ability in human relationship consistent with the position to which he aspires."

As to "Contribution to school's educational program (curriculum developments, preparation of instructional material, etc.)," both rated petitioner as "not quite satisfactory". Mr. Freund wrote that applicant "does not participate in developing instructional ideas or materials for school," and "is emotional and capricious in judgments, particularly when they involve adverse criticism". Mr. Ryan noted: "Applicant's colleagues do not view him as a leader. His interest in professional matters has not been sufficiently positive to qualify him for the position to which he aspires."

Both principals indicated that their ratings were based on personal knowledge, official records, and upon information received from other persons. Mr. Ryan consulted with Milton Nowak, the Chairman of applicant's department, and Mr. Freund with Ross S. Wolff, an Assistant Principal.

Mr. Ryan submitted five memoranda from the applicant's file. Three, based on classroom visits to applicant's class, make essentially negative observations. One memo notes

that applicant does not encourage pupils "to be more communicative" and advises that he "abandon his concern for covering the test in favor of illuminating it by asking key questions." These memoranda had been delivered to petitioner when made. Other exhibits included copies of letters delivered to petitioner commenting on his carelessness in keeping records. (Exibits 2 to 6).

Mr. Freund submitted forty-one derogatory memoranda from the file. Some were by Mr. Freund's predecessor, Mr. Reich. These show repeated specific instances of failure to turn in reports or lesson plans, as required by school directives (Exh. 8, pp. 1-2, 6, 7, 22, 23, 24, 29, 30, 32, 34, 36, 38, 40), instances of failure to cover his class and of excessive lateness (Exh. 8, pp. 34-36, 13), and rudeness and lack of respect for other teachers (Exh. 8, pp. 5-8, 27, 31, 33, 26). It would be too cumbersome to describe all of these memos. One example should suffice to indicate their tenor.

A memorandum to petitioner reads (Exh. 8, p. 15):

> "Subject: Parent's Visit.
>
> This morning Mrs. Attanasio came to the school in answer to a request from you. * * * I sent Mr. Mahrer to tell you that the parent was here and to ask you to meet us in the Guidance Office since you were on an unassigned period and you had no class. You failed to appear even though Mr. Mahrer gave you the message. Please let me know the reason. Thank you.
>
> (signed) Ross Wolff."

A memorandum by Mr. Mahrer confirms this (Exh. 8, p. 14). Petitioner's reply (Exh. 8, p. 15):

> "According to my understanding, I am at no one's 'beck and call' during my unassigned period,

> my professional time (*res adjudicata*). If I am consulted beforehand I will be ready for such an interview. I made no request for an interview with Mrs. Attanasio. I told both Anthony [the student] and Mr. Mahrer that I would meet Mrs. Attanasio in 309 where I was completing other professional activities."

Both Mr. Ryan and Mr. Freund, independently, rated petitioner:

> "(2) I hesitate to recommend the applicant for this license."

(3)

Copies of the completed questionnaires were forwarded to the Board and, simultaneously, to petitioner. He had the right and opportunity to discuss them with the principals and with those with whom the principals consulted.

Afterwards, before the appraisal was made, petitioner was given an opportunity to explain, deny or extenuate these evaluations, and to submit any positive ratings and commendations, at a hearing conducted a two-man panel of special assistants to the Board of Examiners.

The panel's detailed report noted that petitioner "did not response to repeated opportunities to offer adequate and concrete explanations to controvert the accuracy of ratings of '2' and '1' in several vital areas of school service," and the report included specific examples where petitioner's responses were irrelevant and not to the point.

The panel noted that petitioner's "record" shows "specific weakness, such as habital lateness in arriving; irresponsibility in making out grades and recording them;

refusal to accept emergency assignment; quibbling over minor matters; failure to follow dismissal regulations; insensibility in dealing with students; lacking respect for his supervisors," and concluded that it "is not one which shows him to have the qualities of leadership, dedication, and dependability excepted of a chairman of department in day high school." The panel made a "recommendation" to the Board:

> "Record unsatisfactory for license as Chairman of an English Department in Day High School."

(4)

Petitioner had the right to appeal directly to the Board of Examiners for reconsideration of the "unsatisfactory" rating, and did so. The Board's report, after a second hearing, noted that petitioner attempted, on that second hearing, to overcome the negative statements only "by citing positive communications regarding his teaching performance." The Board, in rejecting his "lengthy" appeal wrote (Exh. 10):

> "The fact is that in seeking higher license, the applicant must establish a superior record, not merely a satisfactory one. The burden is on the applicant to be able to demonstrate above average performance as a teacher as a part of demonstrating total fitness for a supervisory administrative post.
>
> Thus, [petitioner's] contention . . . that the fact that he was rated satisfactory for regular teaching license, therefore, indicates that he is also satisfactory for chairman of department, is palpably without merit.

The record clearly shows a long history of clashes with authority, refusal to recognize the need for orderly hierarchy in the school system for the benefit of the children, and with all due recognition of the professional rights of teachers. The appeal does not cast any doubt on the over-all judgment of the Board of Examiners."

I

Petitioner was not deprived of procedural or substantive due process. He was given access to all the data upon which the appraisal of his record was made; two opportunities to present rebuttal evidence; a statement of the reasons for the determination; and review in the state courts.

(a)

Petitioner contends he was deprived of "procedural due process" *inter alia* "by the actions of the Board of Examiners in failing to give him advance notice of the reasons for its proposal to rate unsatisfactory his record as a teacher" (Pet., p. 24). This is not in accord with the facts.

The principals forwarded copies to petitioner at the same time that they forwarded them to the Board (Pet., p. 25). Furthermore, he had the opportunity, prior to a hearing, to discuss the evaluations with all the rating officers as he did with Ryan and Nowak.

The principals were also required to furnish petitioner with copies of those materials from his personnel file that were submitted to the Board. Although respondents alleges that they did this too, the petitioner, in a reply, disputes this.

It is not necessary to review such a purely factual dispute. It is conceded that petitioner should have been served copies of these exhibits from his file. If they were not served here, then it was, at most, an isolated, inadvertent, oversight on the part of Mr. Freund and Mr. Ryan, and not a defect in the Board's prescribed procedures. If there was such omission here it was clearly nonprejudicial. Petitioner had seen these exhibits on other occasions. Almost all were memos addressed and delivered to him (with receipt acknowledged in writing), and some were his own responses. Furthermore, as with any teacher, the personnel file was always available to him. Since it appears that at the first hearing, petitioner did present exhibits from his personnel file which were positive (set out in full at Pet., pp. 8-10, 12-16), he must again have had inspected his personnel file prior to the hearing. And if he felt handicapped at the first hearing, and required another opportunity to review this file, he could have asked for an adjournment to do so. He did not. Finally, and undisputedly, he saw these memos again, long before the second hearing, the one before the Board of Examiners. Thus, at best, we have only a factual dispute whether the prescribed procedure was deviated from in one small respect, and no showing at all that this was significant or prejudicial.

This court does not generally grant certiorari to review specific individual factual issues in isolated cases (*U.S.* v. *Johnston,* 268 U.S. 220, 227 [1924]), except where there is a very obvious and exceptional showing of error. (*Berengi* v. *Immigration Director,* 385 U.S. 630, 635 [1966]), See STERN and GRESSMAN, *op cit,* §§ 4.14, 4.18, 3.34; *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 86, 97-98 (1909).

(b)

Petitioner contends also that he was denied "procedural due process" by being denied "an opportunity to present evidence under oath at the hearing thereon, and to cross examine witnesses at such hearing", in short, a trial-type hearing (Pet., p. 21 *et seq.*).

The "due process" clause does not invariably require a trial-type hearing in every conceivable case of government impairment of private interest. See *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 894-895 [1961] (and cases cited therein); *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). Both cases are cited and quoted, with approval, in *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970). See also, *Madera* v. *Bd. of Educ. of City of New York,* 386 F. 2d 778 (2d C., 1967) cert. den. 390 U.S. 1028 (1968); *Woodbury* v. *McKinnon,* 447 F. 2d 839, 844 (5th C., 1971-en banc).

As was said in *Cafeteria Workers, supra* (at 367 U.S. at p. 895): "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"; and, that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action". As noted in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960): "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account."

Applying these criteria, it is clear that the cases relied on by petitioner are distinguishable. The "right" held to warrant a trial-type hearing there was the right to practice a profession, or employment, with accompany-

ing damage to reputation from an infamous allegation, or something as basic as the right to a bare subsistence. No such "right" is involved here. Secondly, in all the cases cited, there was a narrow issue of fact particularly suitable for adjudication after a trial-type hearing. The "possible burden" (as noted in *Hannah* v. *Larche, supra*) upon the Board here, and in hundreds of similar evaluations of "record", would be overwhelming and impracticable. Here, for instance, there are not only some 40 specific incidents in the "record" but subjective evaluations regarding such matters as sympathetic interest in children, ability to win respect of co-workers and parents, leadership, conscientiousness, tact, ability to take adverse criticism, contribution of ideas at departmental meetings, etc., all subsumed in the term "record," which do not lend themselves to resolution by a trial-type hearing.

Here, due process was satisfied by giving applicants copies of the evaluations and complete access to their personnel files prior to a hearing; then two hearings, one before a panel of the Board and one before the Board itself, at which petitioner had a full opportunity to present rebuttal, explanation, or extenuation, and to submit any positive and favorable material from his personnel file; and, finally, review in the state courts or, alternatively, by the State Commissioner of Education (Educ. Law § 310) of any claim of arbitrariness or illegality.

(c)

Petitioner contends also that he was denied "substantive due process . . . in the sense that Board of Examiners could not make an arbitrary determination . . . contrary to the facts" (Pet., p. 28).

Essentially, this is the same factual argument raised below, there under state law, that the determination was without any evidence and arbitrary (CPLR 7803). It was rejected, on the merits, upon the record, by two state courts, including an unanimous appellate court. And it was then not sought to be reviewed by the State's highest court. (See "Jurisdiction" statement, *supra,* p. 2).

This too is the type of issue of specific facts and limited application that is not generally reviewed by this court, (*U.S.* v. *Johnston,* 268 U. S. 220, 227 [1924]). The fact that it was never raised in the record (nor discussed in any previous appellate brief) as a "substantial due process" claim is, in itself, a jurisdictional bar to its belated presentation now as a "federal question". (*White River Co.* v. *Arkansas,* 279 U.S. 692, 699-700 [1928]).

II

There was an impartial decision maker here. The fact that a two-man panel of special assistants to the Board (who received petitioner's explanation and evidence and made a report and "recommendations" to the Board) were school principals did not disqualify them. Furthermore, it was the Board itself which was the decision maker here; and petitioner had an opportunity, at a second hearing, to present his position fully and directly to the Board.

There is no dispute with the general proposition that procedural due process requires an impartial decision maker. Our position is simply that one was provided here.

Petitioner's argument is that the "panel", since it consisted of school principals, would tend to accept ratings

made by other school principals in preference to an applicant's rebuttal statements. The Board uses special assistants here because of the volume of work; and they, by virtue of their school experience, perform this function more effectively than would strangers to the City's school system. There is no claim that the panel were personal friends of, or were known to, or had even come into professional contact with Mr. Ryan and Mr. Freund, the applicant's present and past supervisor. It is far-fetched to suggest that merely because the panel were school principals (but also were once teachers and applicants for promotions), they could not be impartial. And no request was ever made that they disqualify themselves. Neither of the cases cited by petitioner suggests a basis for disqualification here (assuming *arguendo* the panel were decision makers). Petitioner quotes from *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), for the proposition that even some "prior involvement in some aspect of the case will not necessarily bar [an] . . . official from sitting as a decision maker" so long as he did not "previously participate" in the decision (Pet., p. 32). Neither of the panel members here was in any way involved with petitioner or with the rating officers prior to the hearing.

Moreover, the panel was *not* the decision maker. Its function was only to hear applicant's rebuttal, explanations and other evidence, and to make a report and "recommendation". The decision was made by the Board. Even if petitioner were correct that significant matters were left out of the panel's report to the Board (we submit they were either irrelevant or cumulative) this was no flaw in the procedure. The applicant had the opportunity, at a second hearing, before the Board itself, to present any facts and explanations, and did.

III

Petitioner's contention that the Section 10, subd. 5 of the By-Laws of the Board of Examiners is "unconstitutionally vague" (because it allows for a subjective standard in evaluating an applicant's record) was raised below only, and explicitly, as an issue under state law, and is not a "federal" question within the jurisdiction of this court.

Petitioner contends that the By-Law* is "unconstitutionally vague" because it gives each member of the Board "uncontrolled power to determine, by his own individual standard, whether the applicant has the requisite traits, abilities, and qualities to a degree * * * 'deemed * * * to be necessary or desirable'" (Pet., p. 29).

Petitioner's only argument, in the state courts, proscribing a subjective standard was Article V, Section 6 of the New York Constitution ("Appointments and promotions in the civil service of the state and civil divisions thereof ... shall be made according to merit and fitness to be ascertained, *as far as practicable*, by examination which, *as far as practicable*, shall be competitive; * * *"), and the only case cited, and cited now, is *Matter of Cohen* v. *Fields*, 298 N. Y. 235 (1948), a case applying this New York Constitution "civil service" provision to a *former*

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* By-Law §10, referred to, defines an "unsatisfactory" record:

> "The term 'unsatisfactory' shall mean the applicant is adjudged not fit for the license or position sought, in that he does not possess the traits, abilities, and qualities subsumed under the term 'record' to the degree deemed by the Board of Examiners to be necessary or desirable for the effective performance of the duties pertaining to the license or position sought; * * *"

By-Law, (subsequently replaced). The only argument now raised, on authority of *Cohen,* is that the amended By-Law was "no change in substance". This is no more than an argument that the New York courts have "erred" in applying New York law.

The New York Court of Appeals, in a series of opinions (involving positions in the school system), has held that N.Y. Constitution Article V, §6, does not proscribe subjective judgment in promotional competitive examinations where reliance upon an objective or mechanical standard would be impracticable. *Matter of Sloat* v. *Bd. of Examiners,* 274 N.Y. 367, 373 (1937); *Matter of Nelson* v. *Bd. of Examiners,* 21 NY 2d 408, 416-417 (1968). The "appraisal of record" procedure and the absence of a trial-type hearing were challenged as unconstitutional (subsequent to *Matter of Cohen* v. *Fields,* 298 N.Y. 235 [1948]), and upheld, in cases indistinguishable from the instant one: *Matter of Barnett* v. *Fields,* 301 N.Y. 545 (1950) and *Matter of Diamond* v. *Fields,* 303 N.Y. 776 (1952). The question is now so well settled under New York law that an appeal to the New York Court of Appeals, in the instant case, raising just this constitutional argument, was dismissed as not "substantial" (30 NY 2d 582).

On questions involving the construction of a state Constitution, the decisions of the state's highest court are conclusive. *Paterno* v. *Lyons,* 334 U.S. 314, 319 (1947); *West* v. *Louisiana,* 194 U.S. 258, 261 (1903).

The failure to make this argument in the lower courts as a claimed violation *of the U.S. Constitution* (as distinct from the state Constitution) is enough, in and of itself, to bar petitioner from now raising it in this court. See e.g. *Wilson* v. *Cook,* 327 U.S. 474, 483-484 (1945); *White River Co.* v. *Arkansas,* 279 U.S. 692, 699-700 (1928); *Adler* v. *Bd. of Educ.,* 342 U.S. 485, 496 (1952).

IV

The argument that petitioner's record bears no reasonable relationship to fitness for the supervisory position was not raised below. Nor does it raise a federal question. In any event, a reasonable relationship between the petitioner's record and fitness for the position sought is obvious.

This issue was not raised in any form in any other court —a jurisdictional defect. *Wilson* v. *Cook*, 327 U.S. 474, 485 (1956).

Further, appropriateness of Civil Service examinations for state and local positions is generally a matter of state law. In the three cases cited here by the petitioner, a "federal question" was raised *only* because there was a claim, under the Civil Rights Act of 1964, that the examinations operated to favor one racial group over another. It was this "civil rights" claim that was the basis for "federal" jurisdiction. No such civil rights claim is made here, even now.

Finally, the contention is wholly without merit. The cases cited by petitioner involved question-and-answer examinations allegedly unrelated to the jobs. It does not require "job studies" or argument to establish that personal qualities such as willingness (as distinct from ability) to contribute to curriculum development, conscientiousness in keeping records, punctuality, tact, willingness and ability to get along with fellow teachers, ability to accept criticism and suggestions, etc., (none of which could be established other than by an applicant's prior performance) are all reasonably related to probable success in a sensitive supervisory position in the school system.

CONCLUSION

The petition should be denied.

June 19, 1972.

Respectfully submitted,

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